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Mabel Sheela a/p Victor Muttiah v Clare Louise Brown

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HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-23NCvC-45–08 OF 2019
RAJA AHMAD MOHZANUDDIN SHAH JC
2 MAY 2024

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Civil Procedure — Pleadings — Language of documents — Action for defamation — Original defamatory articles were in English language — Whether it was necessary to translate original defamatory articles in English into Bahasa Melayu in amended statement of claim — Federal Constitution art 15(2) — National Language Act 1963/67 s 8 — Rules of Court 2012 O 92 r 1

D

Tort — Defamation — Impugned defamatory article — Whether impugned defamatory articles contained defamatory remarks that were defamatory in their natural and ordinary meaning — Whether impugned defamatory articles were defamatory of plaintiff — Whether defendant liable for any third-party publications — Whether defendant was entitled to invoke defences of justification, fair comments, qualified privilege and the Reynolds public interest defence — Whether defendant was malicious in publishing words complained of — Whether plaintiff entitled to damages — Defamation Act 1957

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The plaintiff was the special officer to the Attorney General of Malaysia ('the AG') at the time when the late deputy public prosecutor, Dato' Anthony Kevin Morais was murdered. The present case was however not a criminal matter but rather a legal action under the tort of defamation, malicious falsehood and the Defamation Act 1957 filed by the plaintiff against the defendant who was the owner, host, administrator, editor and journalist of a website called *Sarawak Report* in relation to the following three articles: (a) 'How AG's Office Connived to Prevent a Second Post-Mortem on Kevin Morais — Exclusive Expose' published on 20 December 2015 by the defendant in the *Sarawak Report* website ('the first impugned defamatory article'); (b) 'Slapped with RM100m defamation suit but Rewcastle-Brown unaware' published by *Malaysia Kini* dated 11 July 2019 ('the second impugned defamatory article'); and (c) 'Rewcastle-Brown says unaware of RM100mil defamation suit' by *Free Malaysia Today* dated 11 July 2019 ('the third impugned defamatory article'). In relation to the first impugned defamatory article, the plaintiff claimed that the defendant had published the said article in the World Wide Web and made libelous comments which caused irreparable damage to the plaintiff's integrity and credibility, whether directly or indirectly, as a result of its natural and

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ordinary meaning as well as its innuendo. Regarding the other two articles that followed, they were said to have been defamatory since the defendant alleged that the plaintiff had requested compensation for loss of earnings through her letter of demand to the defendant, implying that the plaintiff pursued the action for financial gain in order to become a greedy opportunist. The key issues that arose in the present case were: (i) whether the first impugned defamatory article contained any alleged defamatory remarks that were defamatory in their natural and ordinary meaning, and if so, whether they were defamatory to the plaintiff; (ii) whether the defendant was liable for any third-party publications pleaded by the plaintiff; (iii) whether the second and third impugned defamatory articles constituted defamatory remarks which were defamatory to the plaintiff and if yes, whether the defendant was liable for the alleged defamatory remarks that were published in the *Malaysia Kini* and *Free Malaysia Today*; (iv) whether the defendant was entitled to invoke the defences of justification, fair comments, qualified privilege and the *Reynolds* public interest defence; (v) whether the defendant was malicious in publishing the words complained of; and (vi) if the defendant was found liable, what was the quantum of damages that could be awarded to the plaintiff. In addition to the above issues on the merits of the case, the procedural issue that arose was whether it was necessary to translate the original defamatory articles in English into Bahasa Melayu in the amended statement of claim.

Held, dismissing the plaintiff's claim with costs of RM15,000 subject to allocatur:

(1) In the present case, there was no certified translation of the first impugned defamatory article into Bahasa Melayu. Although some of the plaintiff's arguments appeared to be providing some serious issues for consideration and the defendant was not prejudiced by the failure to translate the first article into Bahasa Melayu, the court was unable to escape the fact that such strict compliance was mandatory for all pleadings filed in court. The requirement for complete pleadings in Bahasa Melayu was tritely attributed to the language's supremacy as a national language. In this regard, the relevant provisions ware enshrined in art 15(2) of the Federal Constitution, s 8 of the National Language Act 1963/67 and O 92 r 1 of the Rules of Court 2012. The court was also bound by the Court of Appeal's decisions in *Rekha d/o Munisamy v Ortus Expert White Sdn Bhd & Anor* [2021] 5 MLJ 836 and *Dato' Seri Anwar bin Ibrahim v Tun Dr Mahathir bin Mohamad* [2010] 2 MLJ 41. In totality, the court held that the defect was so fundamental that it was not permissible for the court to allow the plaintiff's claim as set forth in her amended statement of claim, as such, the plaintiff was not entitled to any compensation for damages resulting from the defamatory article. However, for avoidance of doubt and for the purpose of facilitating

appeals, the court had also considered the merits of the present case (see paras 35–38, 40 & 86). A

(2) With respect to the first impugned defamatory article, the case before the court involved a 'false' innuendo, which had no secondary meaning to the written text, as such, there was no need to plead extrinsic facts as to the special meaning of the impugned words. The wordings in the first article not only conveyed the ordinary and natural meaning by themselves but also an implied or indirect meaning, which in any event did not require the existence of extrinsic facts in a particular area that were difficult to comprehend or acquire. Rather, this meaning could be understood in the ordinary sense and in the literal understanding of the words' most basic and fundamental meaning. As a result, there was no need to take the article metaphorically in order to understand its intended meaning. The susceptibility of readers would not be different from each other after reading the first impugned defamatory article (see paras 43 & 46). B C D

(3) The merits of the present defamation action ought to be determined in two stages. In the first stage, the plaintiff must prove that: (a) the articles were defamatory; (b) the articles were about her; and (c) the articles were published. Upon satisfying the first test, the burden of proof shifted to the defendant in the second stage, who must prove that the alleged articles were not defamatory. In the present case, the second and third elements of the first stage were not in dispute (see para 48). E

(4) The court found that the first impugned defamatory article was clearly defamatory to the plaintiff. It was not necessary to read between the lines of such an article to determine whether or not it contained defamatory elements. The article clearly suggested that the plaintiff was involved in a conspiracy of some kind at the highest level to cheat the family of the late Dato' Anthony Kevin Morais of their rights to a second independent post-mortem report. According to the article, this alleged despicable act was carried out after being backed by the powers that be and with the support of the highest authority given that the remains were snatched the same morning as the application to have the remains postmortem for the second time was filed. However, the question remained: where was the proof of the existence of the 'powers that be', if they existed at all? (see para 56). F G H

(5) The court found that the defendant was not liable for the chain reaction of the publication which was, in any event, outside the defendant's control. In this context, the defendant's liability was limited to publication that she directly authored and published. It should be noted that none of the republications of the first impugned defamatory article made by *Asia Sentinel*, *Hornbill Unleashed Blog* and *The Malaysian Insider* had published the entire article as written by the defendant. In such a I

A case, if any of them paraphrased the entire article with the intention of summarising it, and the result was to create a new meaning from that exercise which was contrary to the original meaning of the first impugned defamatory article, then any further issues should be addressed to them and not the defendant (see paras 60–61).

B (6) Based on the court's observations, it appeared that the second and third impugned defamatory articles were not written by the defendant herself. Further analysis of the plaintiff's arguments indicated that the plaintiff was implying that there had been oral defamation allegedly uttered by the C defendant. This being the case, it was trite to state that the plaintiff bore the burden of proving the claim. In the case of *Lembaga Kemajuan Tanah Persekutuan & Anor v Dr Tan Kee Kwong* [2012] 4 MLJ 622, the court held that when proving that a party published defamatory words or caused the publication of defamatory words, the reporter to whom the D party uttered the defamatory words must be called in to testify. However, in the present case, the plaintiff failed to called the reporters of *Malaysia Kini* and *Free Malaysia Today* to testify. In view of this, the court concluded that the second and third impugned defamatory articles did not sufficiently demonstrate that these were the defendant's exact E quotations (see paras 64–65).

(7) As a result of the court's examination of the messages between the plaintiff and those other parties which were allegedly the basis for the defendant's conclusion that led to the publication of the defamatory F article, it appeared to the court that there was no sinister motive that could be derived from them in the manner described by the defendant. Further, all those accused of murder had been found guilty not only by the High Court but also by the Court of Appeal. It could be concluded from the above that the defendant had failed to justify the publication of G the first impugned defamatory article. Therefore, the defendant could not raise the defence of justification (see paras 70–71 & 73).

(8) In light of the ten established legal principles when dealing with the defence of qualified privilege as outlined in *Reynolds v Times Newspapers* H *Ltd and others* [2001] 2 AC 127, the court concluded that there was no justification for the defendant to publish the first impugned defamatory article in the first place. In this regard, the court found that: (a) the defendant did not have any personal knowledge of the issues that she was addressing in her article; (b) the defendant failed to verify the I information; and (c) the nature of the story did not immediately affect the general public in the sense that it was not something perishable that required immediate dissemination of information. It was also clear from the above findings and analysis that the defence of fair comments could not be maintained (see paras 76–80).

(9) As for malicious falsehood, the court found that malice could be inferred on the basis of the following: (a) the nature and effect of the first impugned defamatory article; (b) the manner in which the plaintiff was being portrayed in the first article; (c) the publication of two photographs of the plaintiff alongside her name card; and (d) the recklessness and unreasonableness in coming to such a conclusion as the defendant did in the first article, which was not based on a fair belief in the truthfulness of the statement, thereby adversely affecting the plaintiff's reputation. The defendant had therefore failed to prove that there was no malice in the publication of the first impugned defamatory article. The existence of malice further undermined the defence of qualified privilege that the defendant attempted to grasp (see paras 81–82 & 84).

(10) It was trite that in defamation cases, the damages that occurred to the plaintiff were presumed to be true in law and therefore there was no requirement to prove damages as it would naturally follow that such defamatory words would harm the plaintiff's reputation. The first impugned defamatory article was published worldwide, which clearly damaged and gravely injured the plaintiff's reputation and integrity. The plaintiff was subjected to public ridicule, odium, contempt, and scandal which had caused profound emotional and mental distress to the plaintiff. As it stands, there could be no restoration of the plaintiff's past life or the suffering she had endured over the years (see paras 87 & 90–92).

(11) Based on the above findings, the court would have granted: (a) general and aggravated damages in the sum of RM1m; (b) a mandatory injunction to remove and delete the first impugned defamatory article; and (c) interest rate of 5%pa from the date of judgment to the date of full realisation. However, the court would not have ordered the defendant to make a public and unqualified apology and written undertaking. Further, the court would not have allowed exemplary damages as the court did not find any element of oppression, arbitrary, or unconstitutional, nor could the court conclude that the defendant intended to make a profit. However, the above remained academic and non-enforceable at this point in light of the court's findings regarding the procedural issue (see paras 97–106).

[Bahasa Malaysia summary

Plaintif merupakan pegawai khas kepada Peguam Negara Malaysia ('AG') ketika mendiang timbalan pendakwa raya, Dato' Anthony Kevin Morais dibunuh. Kes semasa bagaimanapun bukanlah suatu kes jenayah tetapi sebaliknya merupakan suatu tindakan undang-undang di bawah tort fitnah, kepalsuan berniat jahat dan Akta Fitnah 1957 yang difailkan oleh plaintif terhadap defendan yang merupakan pemilik, hos, pentadbir, editor dan wartawan laman web yang dikenali sebagai *Sarawak Report* berhubung dengan

tiga artikel berikut: (a) 'How AG's Office Connived to Prevent a Second Post-Mortem on Kevin Morais — Exclusive Expose' yang diterbitkan pada 20 Disember 2015 oleh defendan dalam laman web *Sarawak Report* ('artikel fitnah pertama yang dipertikaikan'); (b) 'Slapped with RM100m defamation suit but Rewcastle-Brown unaware' yang diterbitkan oleh *Malaysia Kini* bertarikh 11 Julai 2019 ('artikel fitnah kedua yang dipertikaikan'); dan (c) 'Rewcastle-Brown says unaware of RM100mil defamation suit' oleh *Free Malaysia Today* bertarikh 11 Julai 2019 ('artikel fitnah ketiga yang dipertikaikan'). Berhubung dengan artikel fitnah pertama yang dipertikaikan, plaintif mendakwa bahawa defendan telah menerbitkan artikel tersebut dalam World Wide Web dan membuat komen libel yang menyebabkan kerosakan yang tidak boleh diperbaiki kepada integriti dan kredibiliti plaintif, sama ada secara langsung atau tidak langsung, hasil daripada maksud semula jadi dan biasa serta sindirannya. Berkenaan dua artikel lain yang menyusul, kedua-duanya dikatakan telah memfitnah memandangkan defendan mendakwa bahawa plaintif telah meminta pampasan untuk kehilangan pendapatan melalui surat tuntutannya kepada defendan, membayangkan bahawa plaintif mengambil tindakan tersebut untuk keuntungan kewangan untuk menjadi seorang oportunis yang tamak. Isu-isu utama yang timbul dalam kes semasa ialah: (i) sama ada artikel fitnah pertama yang dipertikaikan mengandungi apa-apa kenyataan fitnah yang didakwa memfitnah dalam makna semula jadi dan biasanya, dan jika ya, sama ada ia memfitnah plaintif; (ii) sama ada defendan bertanggungjawab bagi mana-mana penerbitan pihak ketiga yang diplid oleh plaintif; (iii) sama ada artikel fitnah kedua dan ketiga yang dipertikaikan membentuk kenyataan fitnah yang memfitnah plaintif dan jika ya, sama ada defendan bertanggungjawab terhadap kenyataan fitnah yang didakwa yang diterbitkan dalam *Malaysia Kini* dan *Free Malaysia Today*; (iv) sama ada defendan berhak untuk menggunakan pembelaan justifikasi, komen adil, keistimewaan bersyarat dan pembelaan kepentingan awam *Reynolds*; (v) sama ada defendan berniat jahat dalam menyiarkan perkataan yang diadukan; dan (vi) jika defendan didapati bertanggungjawab, berapakah kuantum ganti rugi yang boleh diberikan kepada plaintif. Sebagai tambahan kepada isu-isu di atas mengenai merit kes, isu prosedur yang timbul ialah sama ada terdapat keperluan untuk menterjemah artikel fitnah asal dalam bahasa Inggeris ke dalam Bahasa Melayu dalam pernyataan tuntutan terpinda.

Diputuskan, menolak tuntutan plaintif dengan kos sebanyak RM15,000 tertakluk kepada alokatur:

(1) Dalam kes semasa, tiada terjemahan yang diperakui bagi artikel fitnah pertama yang dipertikaikan ke dalam Bahasa Melayu. Walaupun beberapa hujah plaintif kelihatannya menyediakan beberapa isu serius untuk dipertimbangkan dan defendan tidak diprejudiskan dengan kegagalan untuk menterjemah artikel pertama ke dalam Bahasa Melayu, mahkamah tidak dapat lari daripada hakikat bahawa pematuhan ketat

tersebut adalah wajib bagi semua pliding yang difailkan di mahkamah. Keperluan untuk pliding lengkap dalam Bahasa Melayu dikaitkan dengan ketuanan bahasa tersebut sebagai bahasa kebangsaan. Berkaitan dengan ini, peruntukan yang berkaitan adalah termaktub dalam perkara 15(2) Perlembagaan Persekutuan, s 8 Akta Bahasa Kebangsaan 1963/67 dan A 92 k 1 Kaedah-Kaedah Mahkamah 2012. Mahkamah juga terikat dengan keputusan Mahkamah Rayuan dalam *Rekha d/o Munisamy v Ortus Expert White Sdn Bhd & Anor* [2021] 5 MLJ 836 dan *Dato' Seri Anwar bin Ibrahim v Tun Dr Mahathir bin Mohamad* [2010] 2 MLJ 41. Secara keseluruhannya, mahkamah berpendapat bahawa kecacatan tersebut adalah sangat asas sehingga tidak dibenarkan untuk mahkamah membenarkan tuntutan plaintif seperti yang dinyatakan dalam penyataan tuntutan terpindanya, oleh itu, plaintif tidak berhak mendapat apa-apa pampasan ganti rugi akibat daripada artikel fitnah tersebut. Walau bagaimanapun, untuk mengelakkan keraguan dan untuk tujuan memudahkan rayuan, mahkamah juga telah mempertimbangkan merit kes semasa (lihat perenggan 35-38, 40 & 86).

(2) Berkenaan dengan artikel fitnah pertama yang dipertikaikan, kes di hadapan mahkamah melibatkan sindiran 'palsu', yang tidak mempunyai makna sekunder kepada teks bertulis, oleh itu, tidak perlu untuk memplid fakta ekstrinsik tentang makna istimewa perkataan yang dipertikaikan tersebut. Kata-kata dalam artikel pertama bukan sahaja menyampaikan makna biasa dan semula jadi dengan sendirinya tetapi juga makna tersirat atau tidak langsung, yang dalam apa jua keadaan tidak memerlukan kewujudan fakta ekstrinsik dalam kawasan tertentu yang sukar untuk difahami atau diperolehi. Sebaliknya, makna ini boleh difahami dalam erti kata biasa dan dalam pemahaman literal makna perkataan yang paling asas. Akibatnya, tidak perlu melihat artikel tersebut secara metafora untuk memahami makna yang dimaksudkan. Kecenderungan pembaca tidak akan berbeza antara satu sama lain selepas membaca artikel fitnah pertama yang dipertikaikan tersebut (lihat perenggan 43 & 46).

(3) Merit bagi tindakan fitnah semasa harus ditentukan dalam dua peringkat. Pada peringkat pertama, plaintif hendaklah membuktikan bahawa: (a) artikel tersebut memfitnah; (b) artikel tersebut adalah berkenaan dirinya; dan (c) artikel tersebut diterbitkan. Setelah memenuhi ujian pertama, beban pembuktian beralih kepada defendan pada peringkat kedua, yang perlu membuktikan bahawa artikel yang dipertikaikan tersebut tidak berunsur fitnah. Dalam kes semasa, elemen kedua dan ketiga bagi peringkat pertama adalah tidak dipertikaikan (lihat perenggan 48).

(4) Mahkamah mendapati artikel fitnah pertama yang dipertikaikan adalah jelas memfitnah plaintif. Tiada keperluan untuk membaca maksud

tersirat artikel sedemikian untuk menentukan sama ada ia mengandungi unsur-unsur fitnah atau tidak. Artikel tersebut jelas mencadangkan bahawa plaintif terlibat dalam beberapa jenis konspirasi di peringkat tertinggi untuk manafikan keluarga mendiang Dato' Anthony Kevin Morais hak mereka untuk laporan bedah siasat bebas kedua. Menurut artikel tersebut, perbuatan keji yang didakwa ini dilakukan selepas mendapat sokongan daripada 'powers that be' dan dengan sokongan pihak berkuasa tertinggi memandangkan jenazah tersebut diambil pada pagi yang sama ketika permohonan untuk mendapatkan bedah siasat buat kali kedua difailkan. Walau bagaimanapun, persoalan yang masih tidak terjawab adalah: di manakah bukti kewujudan 'powers that be' ini jika mereka benar-benar wujud? (lihat perenggan 56).

(5) Mahkamah mendapati bahawa defendan tidak bertanggungjawab ke atas kesan berantai penerbitan yang, dalam apa jua keadaan, di luar kawalan defendan. Dalam konteks ini, liabiliti defendan terhad kepada penerbitan yang ditulis dan diterbitkan secara langsung olehnya. Perlu diingatkan bahawa tiada satu pun penerbitan semula artikel fitnah pertama tersebut yang dibuat oleh *Asia Sentinel*, *Hornbill Unleashed Blog* dan *The Malaysian Insider* telah menerbitkan keseluruhan artikel seperti yang ditulis oleh defendan. Dalam kes sedemikian, jika mana-mana daripada mereka menghuraikan keseluruhan artikel dengan tujuan untuk meringkaskannya, dan hasilnya adalah untuk mencipta makna baru daripada usaha tersebut yang bertentangan dengan maksud asal artikel fitnah pertama yang dipertikaikan, maka apa-apa isu lanjut harus ditujukan kepada mereka dan bukannya defendan (lihat perenggan 60–61).

(6) Berdasarkan pemerhatian mahkamah, kelihatannya artikel fitnah kedua dan ketiga yang dipertikaikan tidak ditulis oleh defendan sendiri. Analisis lanjut terhadap hujah plaintif menunjukkan bahawa plaintif membayangkan bahawa terdapat fitnah lisan yang didakwa diucapkan oleh defendan. Oleh kerana ini, adalah lazim untuk menyatakan bahawa plaintif menanggung beban untuk membuktikan tuntutan tersebut. Dalam kes *Lembaga Kemajuan Tanah Persekutuan & Anor v Dr Tan Kee Kwong* [2012] 4 MLJ 622, mahkamah memutuskan bahawa dalam membuktikan sesuatu pihak menerbitkan perkataan berunsur fitnah atau menyebabkan penyiaran perkataan berunsur fitnah, wartawan yang kepadanya pihak tersebut mengeluarkan perkataan fitnah itu perlulah dipanggil untuk memberi keterangan. Bagaimanapun, dalam kes semasa, plaintif gagal memanggil wartawan *Malaysia Kini* dan *Free Malaysia Today* untuk memberi keterangan. Memandangkan perkara ini, mahkamah membuat kesimpulan bahawa artikel fitnah kedua dan ketiga yang dipertikaikan tersebut tidak secukupnya menunjukkan bahawa ia adalah cuplikan tepat daripada defendan (lihat perenggan 64–65).

(7) Hasil daripada pemeriksaan mahkamah terhadap mesej antara plaintif dan pihak-pihak lain yang didakwa menjadi asas kepada kesimpulan defendan yang membawa kepada penerbitan artikel fitnah tersebut, mahkamah mendapati bahawa tidak ada motif jahat yang boleh diperolehi daripada mesej tersebut mengikut cara yang diterangkan oleh defendan. Tambahan pula, kesemua mereka yang dituduh membunuh telah didapati bersalah bukan sahaja oleh Mahkamah Tinggi tetapi juga oleh Mahkamah Rayuan. Daripada dapatan-dapatan di atas dapat disimpulkan bahawa defendan telah gagal untuk menjustifikasikan penerbitan artikel fitnah pertama yang dipertikaikan tersebut. Oleh itu, defendan tidak boleh membangkitkan pembelaan justifikasi (lihat perenggan 70–71 & 73).

(8) Berdasarkan sepuluh prinsip undang-undang yang telah ditetapkan dalam mengendalikan pembelaan keistimewaan bersyarat seperti yang digariskan dalam *Reynolds v Times Newspapers Ltd and others* [2001] 2 AC 127, mahkamah membuat kesimpulan bahawa tiada justifikasi bagi defendan untuk menerbitkan artikel fitnah pertama yang dipertikaikan tersebut. Dalam hal ini, mahkamah mendapati bahawa: (a) defendan tidak mempunyai apa-apa pengetahuan peribadi tentang isu-isu yang dikemukakan olehnya dalam artikelnya; (b) defendan gagal untuk mengesahkan maklumat tersebut; dan (c) sifat cerita tersebut tidak serta-merta menjejaskan masyarakat umum dalam erti kata bahawa ia bukanlah sesuatu yang mudah rosak yang memerlukan penyebaran maklumat segera. Ia juga jelas daripada dapatan-dapatan dan analisis di atas bahawa pembelaan komen adil tidak dapat dikekalkan (lihat perenggan 76–80).

(9) Bagi kepalsuan berniat jahat, mahkamah mendapati bahawa niat jahat boleh disimpulkan berdasarkan perkara-perkara berikut: (a) sifat dan kesan artikel fitnah pertama yang dipertikaikan tersebut; (b) cara bagaimana plaintif digambarkan dalam artikel pertama tersebut; (c) penerbitan dua gambar plaintif bersama kad namanya; dan (d) sikap melulu dan tidak munasabah dalam membuat kesimpulan seperti yang defendan lakukan dalam artikel pertama tersebut, yang bukan berdasarkan kepercayaan yang saksama terhadap kebenaran kenyataan tersebut yang seterusnya telah menjejaskan reputasi plaintif. Oleh itu, defendan telah gagal membuktikan bahawa tiada niat jahat dalam penerbitan artikel fitnah pertama yang dipertikaikan tersebut. Kewujudan niat jahat juga turut melemahkan lagi pembelaan keistimewaan bersyarat yang disandarkan oleh defendan (lihat perenggan 81–82 & 84).

(10) Sudah menjadi prinsip yang mantap bahawa dalam kes-kes fitnah, kerugian yang berlaku kepada plaintif dianggap benar di sisi undang-undang dan oleh itu tiada keperluan untuk membuktikan

kerugian kerana perkataan fitnah tersebut akan secara semula jadinya menjejaskan reputasi plaintif. Artikel fitnah pertama yang dipertikaikan telah diterbitkan di seluruh dunia, yang jelas merosakkan dan menjejaskan reputasi dan integriti plaintif. Plaintif telah menerima cemuhan awam, kebencian, penghinaan, dan skandal yang telah menyebabkan tekanan emosi dan mental yang mendalam kepada plaintif. Dalam keadaan sedemikian, kehidupan lampau plaintif atau penderitaan yang ditanggungnya selama bertahun-tahun tidak mungkin dapat dipulihkan (lihat perenggan 87 & 90–92).

(11) Berdasarkan dapatan-dapatan di atas, mahkamah akan memberikan: (a) ganti rugi am dan teruk berjumlah RM1 juta; (b) injunksi mandatori untuk membuang dan memadam artikel fitnah pertama yang dipertikaikan; dan (c) faedah 5% setahun dari tarikh penghakiman hingga tarikh penyelesaian penuh. Bagaimanapun, mahkamah tidak akan memerintahkan defendan membuat permohonan maaf secara terbuka dan tanpa syarat serta aku janji bertulis. Selanjutnya, mahkamah tidak akan membenarkan ganti rugi teladan kerana mahkamah tidak menemui apa-apa unsur penindasan, arbitrari, atau pertentangan dengan Perlembagaan, dan mahkamah juga tidak boleh membuat kesimpulan bahawa defendan berniat untuk mengaut keuntungan. Walau bagaimanapun, perkara di atas kekal menjadi perkara akademik dan tidak boleh dikuatkuasakan pada ketika ini berdasarkan dapatan-dapatan mahkamah berkenaan isu prosedur tersebut (lihat perenggan 97–106).]

Cases referred to

Chin Choon @ Chin Tee Fut v Chua Jui Meng [2005] 3 MLJ 494, CA (refd)

Chok Foo Choo @ Chok Kee Lian v The China Press Bhd [1999] 1 MLJ 371, CA (refd)

Datuk May Phng @ Cho Mai Sum (suing as chairman, committee member and representative of Persatuan Penganut Buddha Rumah Kechara Malaysia ('Kechara House'), an association registered under the Societies Act 1966 and in the capacity of representative of Kechara House and/or all Kechara House's members) & Ors v Tan Pei Pei [2018] 11 MLJ 741, HC (refd)

Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor [2010] 2 MLJ 492, HC (refd)

Dato' Seri Anwar bin Ibrahim v Tun Dr Mahathir bin Mohamad [2010] 2 MLJ 41, CA (refd)

Dato Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor [2014] 4 MLJ 242, CA (refd)

International Times & Ors v Leong Ho Yuen [1980] 2 MLJ 86, FC (refd)

Jahara Hamid lwn Lim Guan Eng [2015] MLJU 2358; [2015] 6 CLJ 328, HC (refd)

Lembaga Kemajuan Tanah Persekutuan & Anor v Dr Tan Kee Kwong [2012] 4 MLJ 622, HC (folld)

Liu Thian Leong & Ors v Jee Nyen Chong (sued in his personal capacity and as an office-bearer of the Jawatan Kuasa Dewan Siburan (Siburan Hall Committee) under the provision of s 9(c) of the Societies Act 1966) & Ors [2022] 1 MLJ 420, CA (refd)
MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun & other appeals [1995] 2 MLJ 493, CA (refd)
Plato Films Ltd & Ors v Speidel [1961] AC 1090
Rekha d/o Munisamy v Ortus Expert White Sdn Bhd & Anor [2021] 5 MLJ 836, CA (folld)
Reynolds v Times Newspapers Ltd and others [2001] 2 AC 127, CA (refd)
Rookes v Barnard [1964] 1 All ER 367, HL (refd)
Sivabalan a/l P Asapathy v The New Straits Times Press (M) Bhd [2010] 9 MLJ 320, HC (refd)
Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors [1996] 1 MLJ 393, HC (refd)
Yuvarani w/o Ravindra v Percetakan Kum Sdn Bhd & Ors and another suit [2010] 6 MLJ 106, HC (refd)

Legislation referred to

Defamation Act 1957
Federal Constitution art 152
National Language Act 1963/67 s 8
Rules of Court 2012 O 92 r 1

David Gurupatham (with Satwant Kaur and Venothani Raja Gopal) (David Gurupatham & Koay) for the plaintiff.
Guok Ngek Seong (with Yong Jei Beng) (Guok Partnership) for the defendant.

Raja Ahmad Mohzanuddin Shah JC:

PRELIMINARY

[1] 'No one could ever meet death for his country without the hope of immortality' — Cicero.

[2] It is evident from this quotation by the greatest forensic orator Rome has ever produced that sacrificing and dying for one's country is the highest form of honour, and the sacrifices of the past must remain immortal in the minds of future generations.

[3] This is how the story unfolds.

[4] A shock wave swept through the entire nation when the late deputy public prosecutor Dato' Anthony Kevin Morais was murdered. Apart from his

family, his colleagues at the Attorney General's Chambers ('AGC'), one of the most important pillars in maintaining the rule of law and as the gatekeeper of justice, were the most affected. One of them is the plaintiff, who was the Special Officer to the Attorney General of Malaysia at the time.

[5] As we observe this heinous crime, we have never once dared to imagine that, rather than fully utilising the justice system to clear the accused of an alleged offence, he would resort to an unthinkable act by eliminating the deputy public prosecutor responsible for prosecuting him.

[6] As a result of the thorough investigation conducted by the Royal Malaysian Police, the perpetrators of this crime were swiftly arrested and charged. The High Court found them guilty, and the Court of Appeal recently affirmed that verdict, upholding the death penalty for these six men convicted of the murder of the late Dato' Anthony Kevin Morais.

[7] One of the most noteworthy aspects of that criminal case was the fact that no other individuals were involved in the murder of the late Dato' Anthony Kevin Morais nor did any facts exist that were relevant to the plaintiff in relation to the alleged issues raised in this suit.

AN OVERVIEW OF THE FACTS OF THE CASE

[8] In this case, the criminality element of the late Dato' Anthony Kevin Morais' death and the convictions of his murderers have no bearing on the dispute before me. Still, rather, the focus of the dispute has been the alleged defamatory articles that came up as a result of this tragedy, which led to the plaintiff, a sitting sessions court judge at the time of filing the action, bringing this suit on the grounds that the articles have led to public odium, contempt and scandal against the plaintiff.

[9] In this regard, it appears that the plaintiff has had a distinguished legal and judicial career spanning 24 years, beginning with her position as senior assistant registrar of the Ipoh High Court under the supervision of the late Dato' Anthony Kevin Morais, a magistrate, deputy registrar, sessions court judge and senior deputy public prosecutor. She also served in various divisions, including the Research Division, the Drafting Division, the Law Revision and the Reform Division. Additionally, she served as the Special Officer to the Attorney General of Malaysia, the Head of the Secretariat for the Attorney General's Office and the Head of the Statistics Unit under the Chief Registrar's Office.

[10] The defendant, a British citizen, is the owner, host, administrator, editor and journalist of a website called *Sarawak Report*, accessible at

www.sarawakreport.org. Through the *Sarawak Report*, she has gained international recognition. A

[11] The following three articles are considered to be defamatory in this case:

(a) 'How AG's Office Connived to Prevent a Second Post-Mortem on Kevin Morais — Exclusive Expose' dated 20 December 2015 ('first impugned defamatory article'); B

(b) 'Slapped with RM100m defamation suit but Rewcastle-Brown unaware' published by *Malaysia Kini* dated 11 July 2019 ('second impugned defamatory article'); and C

(c) 'Rewcastle-Brown says unaware of RM100m defamation suit' by *Free Malaysia Today* dated 11 July 2019 ('third impugned defamatory article');

collectively referred to as the impugned defamatory articles. D

[12] The dispute began, however, with the first impugned defamatory article. It was published on 20 December 2015 on the *Sarawak Report* website by the defendant. After discovering it on 21 December 2015, the plaintiff immediately filed a police report on 22 December 2015. E

[13] Considering the title of the first impugned defamatory article, it is not surprising that the article attracted attention.

F

[14] In this connection, there is no dispute that the article has been published, and even the defendant has admitted to having written it.

[15] The plaintiff claims the defendant published the first impugned defamatory article online on the World Wide Web and made libellous comments in which the libel caused irreparable damage to the plaintiff's integrity and credibility, whether directly or indirectly, as a result of its natural and ordinary meaning as well as its innuendo. G

[16] The plaintiff then issued a letter of demand to the defendant through the plaintiff's solicitors, Messrs David Gurupatham & Koay, at the defendant's residential address in the United Kingdom via international courier and AR Registered Post with a copy sent to her email address as well. According to the letter of demand, the defendant must issue a public and unqualified apology, delete the posting from any media or forum under her control, refrain from further defamation or libel, and finally pay damages of RM100m. H I

[17] The plaintiff alleged that the defendant refused to acknowledge receipt of the letter of demand sent by both methods despite receiving it.

[18] Regarding the other two impugned defamatory articles that followed, they were said to have been defamatory since the defendant alleged that the plaintiff had requested compensation for loss of earnings through her letter of demand, implying that the plaintiff pursued the action for financial gain in order to become a greedy opportunist.

[19] These events led to the filing of this legal action under the tort of defamation, malicious falsehood and the Defamation Act 1957.

ISSUES TO BE TRIED

[20] The parties have presented comprehensive submissions that enable me to identify and address a few of the significant issues that I believe will sufficiently tie up and connect the parties' legal relationship and address liabilities if they are found to have arisen.

[21] Pursuant thereto, there are several key issues to be addressed:

(a) whether the first impugned defamatory article contained any alleged defamatory remarks that are defamatory in their natural and ordinary meaning? If so, are they defamatory to the plaintiff?

(b) whether the defendant is liable for any third-party publications pleaded by the plaintiff?

(c) whether the second and third impugned defamatory articles constitute defamatory remarks which are defamatory to the plaintiff? If yes, is the defendant liable for the alleged defamatory remarks that were published in the *Malaysia Kini* and *Free Malaysia Today*?

(d) whether the defendant is entitled to invoke the defences of justification, fair comments, qualified privilege and the *Reynolds* public interest defence?

(e) was the defendant malicious in publishing the words complained of? and

(f) if the defendant is found liable, what is the quantum of damages that can be awarded to the plaintiff?

[22] However, these are not the only issues that arose for my consideration after the trial. As it appears, there is one procedural issue that needs to be addressed first.

COURT'S ANALYSIS AND FINDINGS

Whether it is necessary to translate the original defamatory articles in English into Bahasa Melayu in the amended statement of claim?

[23] The parties have raised several issues concerning the merits of the plaintiffs claim and the defences raised by the defendant, along with one procedural, technical objection regarding the plaintiff's alleged non-compliance with the Rules of Court 2012 ('the ROC'). Due to the fatal nature of the defendant's objection, I must address it first before examining other merit-related issues, if necessary.

[24] In her attack on the plaintiff's case, the defendant raises a procedural technicality issue that may appear insignificant but has a tremendous impact on the plaintiff's claim.

[25] Here is the crux of the matter.

[26] The defendant contends that the plaintiff, in her amended statement of claim, had solely provided the first impugned defamatory article in English, the original language of the defamatory article, as opposed to translating it into Bahasa Melayu, which is the court's official language. This failure to provide a certified translation of the article in English to Bahasa Melayu is viewed by the defendant as being fatal to the plaintiff's case. The defendant is also raising the same objection against the second impugned defamatory article, although it only involved a sentence.

[27] In order to support this argument, the defendant relies heavily on the Court of Appeal case of *Rekha d/o Munisamy v Ortus Expert White Sdn Bhd & Anor* [2021] 5 MLJ 836. This case specifically determines the law pertaining to the issue of pleadings, which are official documents filed in court in support of a party's claim or defence, that are not drafted in Bahasa Melayu.

[28] With an understanding of where the defendant is coming from, I must now look at the plaintiff's forceful response. In this regard, the plaintiff admits that the first impugned defamatory article, which has been reduced in the amended statement of claim, is only in English and does not contain a certified translation into Bahasa Melayu. While this may be true, the plaintiff maintains that despite this she has pleaded the 'Particulars of Libel/Defamation' in the amended statement of claim in Bahasa Melayu, where they are referred to as 'butiran-butiran libel/fitnah', which according to her is sufficient to reflect what the words would have meant had they been translated into Bahasa Melayu.

[29] The plaintiff also points out that despite the fact that the defamatory words contained in the first impugned defamatory article were not translated into Bahasa Melayu, the plaintiffs amended statement of claim is not defective in this regard as the original impugned defamatory article was written and published in English, and the plaintiff has pleaded an exact copy of this article

in the amended statement of claim. A further argument made by the plaintiff is that not only did the defendant admit to writing the alleged defamatory article, but she did not express any objection before this time by, amongst others, filing an application to strike out the plaintiff's claim on this ground.

[30] According to the plaintiff, it is therefore unreasonable for the defendant to appear before the court now at this stage of the proceedings to argue that the entire claim needs to be dismissed as a consequence of the plaintiff's failure to translate the first impugned defamatory article into the national language especially when the defendant herself, who was born and raised as a British citizen, would have difficulty understanding proceedings conducted in Bahasa Melayu, resulting in all proceedings being conducted in English.

[31] Having been apprised of the plaintiff's position, I am now required to examine the legal provisions that address the issue at hand. As a starting point, I will refer to O 92 r 1 of the ROC which provides the following legal provision:

> Language of documents (O 92, r 1)
>
> 1.(1) Subject to paragraph (2), any document required for use in pursuance of these Rules shall be in the national language and may be accompanied by a translation thereof in the English language, except that the translation for the purpose of Order 11, rule 6(4) and rule 7(1) shall be prepared in accordance with rule 6(5) of that Order:
>
> Provided that any document in the English language may be used as an exhibit, with or without a translation thereof in the national language.
>
> (2) For Sabah and Sarawak, any document required for use in pursuance of these Rules shall be in the English language and may be accompanied by a translation thereof in the national language except that the translation for the purpose of Order 11, rule 6(4) and rule 7(1) shall be prepared in accordance with rule 6(5) of that Order.

[32] The analysis of this issue is incomplete without tracing the origin of the supreme position on our national language issue, which is clearly rooted in the Federal Constitution. The Federal Constitution provides guidance on this point in art 152 which clearly states the following:

> 152 National language
>
> (1) The national language shall be the Malay language and shall be in such script as Parliament may by law provide ...

[33] Following this, the National Language Act 1963/67 subsequently came into being with its s 8 providing the following requirement regarding the use of the national language in all courts:

> Language of Courts

All proceedings (other than the giving of evidence by a witness) in the Federal Court, Court of Appeal, the High Court or any Subordinate Court shall be in the national language:

Provided that the Court may either of its own motion or on the application of any party to any proceedings and after considering the interests of justice in those proceedings, order that the proceedings (other than the giving of evidence by a witness) shall be partly in the national language and partly in the English language.

[34] As a final analysis, my next step will be to examine the recent Court of Appeal decision in *Rekha d/o Munisamy v Ortus Expert White Sdn Bhd & Anor* [2021] 5 MLJ 836. In delivering the decision on behalf of the Court of Appeal when deciding that the alleged defamatory statements must be translated into Bahasa Melayu, His Lordship Abu Bakar Jais JCA (as His Lordship then was) thoroughly analysed the issue and made the following detailed observations at pp 852, 854 and 855:

Whether the plaintiffs failed to translate the alleged defamatory statements into Bahasa Melayu

[44] There is no dispute the alleged defamatory statements by the defendant were in English. The defendant submitted these statements must be translated into Bahasa Melayu before the court. First, the defendant referred to O 92 r 1 of the ROC in support of this contention...

[48] Referring also to the Court of Appeal case of *Dato' Seri Anwar bin Ibrahim v Tun Dr Mahathir bin Mohamad* [2010] 2 MLJ 41, the defendant reiterated the importance of the translation and quoted Abdul Malik Ishak JCA (as he then was) in this case who said as follows:

[49] The importance of the Malay language as the national language cannot be taken lightly. Indeed Nik Hashim JC (later FCJ) in *Zainun Bte Hj Dahan lwn Rakyat Merchant Bankers Bhd & satu lagi* [1998] 1 MLJ 532 at pp 535–536, emphasised the usage of the Malay language in our courts in these erudite terms:

Pemfailan 'notice of motion' ini dalam bahasa Inggeris bukan sahaja menyalahi A 92 k 1 KMT malah ia juga melanggar s 8 Akta Bahasa Kebangsaan 1963/1967 ('Akta tersebut) yang memperuntukkan:

> Segala prosiding (selain daripada pemberian keterangan oleh seseorang saksi) dalam Mahkamah Agung, Mahkamah Tinggi atau mana-mana mahkamah rendah hendaklah dalam bahasa kebangsaan:
>
> Dengan syarat bahawa mahkamah boleh, sama ada atas kehendaknya sendiri atau atas permintaan mana-mana pihak dalam mana-mana prosiding dan selepas menimbangkan kepentingan keadilan dalam prosiding itu, memerintahkan supaya prosiding itu (selain daripada pemberian keterangan oleh seseorang saksi) dijalankan sebahagiannya dalam bahasa kebangsaan dan sebahagiannya dalam bahasa Inggeris.
>
> Penggunaan Bahasa Melayu di mahkamah tidak boleh dipermudahkan dan diambil ringan. Perlembagaan Persekutuan menetapkan bahasa kebangsaan negara ialah Bahasa Melayu (perkara 152). Dengan

peruntukan undang-undang di atas, maka keraguan atas penggunaan Bahasa Melayu dalam prosiding mahkamah tidak boleh dipersoalkan lagi. Jadi, penggunaannya hendaklah dilaksanakan dengan ketatnya oleh semua pihak. Mahkamah hendaklah memainkan peranannya dengan melaksanakan kuasanya dengan sewajarnya. Kaedah-kaedah mahkamah termasuk A 92 k 1 adalah digubal bukan untuk hiasan tetapi untuk dipatuhi supaya prosiding di mahkamah dapat berjalan dengan sempurna. Ketakpatuhan kepada peraturan atau kaedah-kaedah mahkamah akan membawa prosiding di mahkamah menjadi kelam kabut *(Sykt Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd* [1994] 2 MLJ 420; [1993] 3 CLJ 629).

Permohonan melalui notis usul bukan suatu perkara yang susah atau rumit untuk dibuat dalam Bahasa Melayu. Dalam kes ini, 'notice of motion' sengaja dibuat dan difailkan bersekali dengan afidavit serta pernyataan dalam bahasa Inggeris tanpa memperdulikan peruntukan A 92 k 1 KMT, Akta tersebut dan Perlembagaan Persekutuan. Tidak ada sebab mengapa permohonan ini tidak boleh dibuat dalam Bahasa Melayu. Teks yang sahih ialah teks dalam Bahasa Melayu. Sekiranya mahkamah tidak berwaspada dan bertindak dari awal, sudah tentu lampiran 3 ini akan 'terlepas' dan pendengaran permohonan diteruskan tanpa mematuhi kaedah tersebut. Ketakpatuhan undang-undang tidak boleh dibiarkan. Permohonan di lampiran 3 adalah sungguh tidak teratur dan ia tidak boleh diterima dan dipertimbangkan oleh mahkamah sama sekali.

[50] We categorically say that the mandatory provisions of art 152 of the Federal Constitution read together with s 8 of the National Language Acts, 1963/1967 (Act 32) and s 3 of the Interpretation Acts 1948 and 1967 (Act 388) must be adhered to. It requires the appellant to file the memorandum of appeal in the national language. No other language will be entertained. And the failure of the appellant to do so amounts to a blatant breach which would compel us to conclude that no memorandum of appeal has been filed at all. The purported memorandum of appeal in the English language must accordingly be rejected outright without further ado. What is mandatory, must be strictly adhered to. Otherwise dire consequences would follow.

[51] Indeed the salutary advice of Chang Min Tat J (as he then was) in *Yu Oi Yong & Anor v Ho Toong Peng & Ors* [1977] 1 MLJ 120 at p 121, must be heeded. There His Lordship said:

> There should, in my view, be some adherence to the rules of court, unless required by circumstances, if there is to be any meaning or purpose in such rules.
>
> It should I think, be realised by practitioners as well as by judges that while strict and slavish adherence to forms and rules can sometimes hinder the administration of justice, these forms and rules should not be disregarded for no reason whatsoever, since they embody the experience of the courts over the years in the cause ((sic) (course)) of speedy and efficient administration of justice.

[52] We observe that the word 'shall' appears in s 8 of the National Language Acts, 1963/1967 (Act 32). Likewise, the word 'shall' also appear in rr 18(1) and 101 of the

Rules of the Court of Appeal 1994. It is quite obvious that the use of the word 'shall' raises a presumption that the particular provision is imperative *(State of Uttar Pradesh v Manbodhan Lai Srivastava* [1958] SCR 533 and *Manbodhan Lai Srivastava v State of UP* 1957 SC 912 at p 917; *State of Uttar Pradesh v Babu Ram AIR* [1961] SC 751 at p 765; *M/s Sainik Motors, Jodhpur & Ors v State of Rajasthan AIR* [1961] SC 1480 at p 1485; and *Govind Lai Chaggan Lai Patel v The Agriculture Produce Market Committee & Ors AIR* [976] SC 263 at p 267), and it is also ordinarily mandatory. It is also correct to say that when a statute uses the word 'shall', prima facie it is mandatory. And once it is held to be mandatory, the failure to comply with it will invalidate anything done under the statute.

[53] Thus, the failure on the part of the appellant to file a memorandum of appeal in *Bahasa Malaysia* renders the purported record of appeal filed by the appellant useless. It will not qualify as a record of appeal. It is our judgment that there is no proper or competent appeal before us.

[49] In the defamation case of *Lim Kit Siang v Datuk Dr Ling Liong Sik & Ors* [1997] 5 MLJ 523, Zainun Ali JC (later FCJ) held as follows:

> The authorities are manifest in their approach that it is fundamental that the exact words as uttered (by the first defendant in this case) *must be reproduced in the original language with a certified translation in the language of the court,* in the absence of which the claim will fail. (Emphasis added.)

[50] The statutory provisions and case law authorities as narrated above, relied upon by the defendant on this point are quite clear in requiring such translation to be made by the plaintiffs. These are cogent authorities supporting the defendant's contention that the alleged defamatory statements must be translated into Bahasa Melayu.

[51] In turn, the plaintiffs submitted that although there was no translation into Bahasa Melayu in respect of the defamatory statements, they could still use exhibits which are in English without translation into Bahasa Melayu. In this regard, they specifically referred to O 92 r 1(4)(b) of the ROC which states as follows:

> ... any document in the English language may be used as an exhibit, with or without a translation thereof in the national language.

[52] With respect to the plaintiffs, the above reference is only on exhibits. It does not at all refer to pleadings. In the 'penyataan tuntutan terpinda' the plaintiffs did not translate the alleged defamatory statements into Bahasa Melayu. Considering the statutory provisions and case law authorities alluded to earlier, this would be fatal against the plaintiffs. As a consequence, the submission of the defendant on this point should be accepted.

[35] Having equipped myself with all those authorities in dealing with this issue, it is hereby my finding that although some of the arguments made by the plaintiff appear to be providing some serious issues for consideration, and the fact that no party, particularly the defendant, is prejudiced by the failure to translate the first impugned defamatory article into Bahasa Melayu, I am unable to escape the fact that such strict compliance is mandatory for all

pleadings filed in court. In my opinion, the requirement for complete pleadings in Bahasa Melayu is tritely attributed to the language's supremacy as a national language. In this regard, the relevant provisions are enshrined in art 152 of the Federal Constitution as well as s 8 of the National Language Act 1963/67 and O 92 r 1 of the ROC.

[36] I also find that despite the plaintiff's argument that the meaning and wordings of such an article have been translated into Bahasa Melayu, I find that they are merely an inference that the plaintiff draws as to the true meaning of the first impugned defamatory article. To put it simply, there was still no certified translation of the first impugned defamatory article into Bahasa Melayu.

[37] In any case, I am nevertheless bound by the decision of the Court of Appeal in the case of *Rekha d/o Munisamy v Ortus Expert White Sdn Bhd & Anor* [2021] 5 MLJ 836 pursuant to the doctrine of stare decisis. Furthermore, I am aware that another Court of Appeal decision in the case of *Dato' Seri Anwar bin Ibrahim v Tun Dr Mahathir bin Mohamad* [2010] 2 MLJ 41 has the same mandatory effect.

[38] As a result of this overall analysis, I am therefore constrained to hold that the defect is so fundamental that it is not permissible for me to allow the plaintiffs claim as set forth in her amended statement of claim. As a result, the plaintiffs claim must fail.

Whether the first impugned defamatory article contained any alleged defamatory remarks that are defamatory in their natural and ordinary meaning? If so, are they defamatory to the plaintiff?

[39] In light of my findings above, nothing prevents me from relying solely on those grounds as the basis for my decision. However, this case may be subject to further appeals. In such events, I cannot rule out the possibility that the higher courts may disagree with me on this issue based on the specific and distinct circumstances of this case. If this were to occur, I must make every effort to prevent this matter from being remitted to the High Court for retrial on the merits of the claim as well as the defence. This is crucial to reducing legal costs and saving time and energy for the parties involved. It is, therefore, necessary for me to make further findings following the fact that all parties have extensively argued those issues.

[40] Against this background, this may seem academic at this point, but for the avoidance of doubt, the purpose is merely to facilitate appeals by any parties herein and hopefully to assist the Court of Appeal in the first instance when it comes to merit-related issues in the event that the need arises. Thus, I will now

turn my attention to the merits of this case, assuming for the moment that the defendant did not raise such a technical objection at the outset.

[41] Regarding the merits, the defendant first argues that apart from the alleged defamatory meaning in their ordinary and natural sense, the plaintiff failed to assert any imputations alleged to be defamatory by way of innuendo. In this regard, it has been argued that since the plaintiff only pleaded that the first impugned defamatory article was defamatory in its ordinary and natural meaning, the court is not bound to consider the alleged innuendo.

[42] To address this issue and ultimately the dispute between the parties, it is necessary to examine the first impugned defamatory article. As the article involves extensive writing and sensitive photographs, I will not be able to reproduce the full contents. However, I will extract some relevant parts that merit reproduction in order to provide a clearer understanding of the entire scenario surrounding this dispute. They are as follows:

> They reveal a series of shocking attempts by one of the AG's own top officials to first bully and then bribe the family into cremating the body of Kevin Morais, before a second postmortem could be performed.
>
> When these attempts failed, the messages show that this official, one of Apandi's closest aids, issued a naked threat against Kevin's brother Charles Morais:
>
> > Any updates on Surest) [Charles]? Has he told u anytg (sic)? The [AG's] chambers ur beginning to querie abt hm, they seem to know he is mischievous an has other motives, they have read everythg on him an believe he is staling (sic) Kevin's cremation coz of other matters affecting him, *he shld be careful if I was hm* (sic)
> >
> > [message from AG's Special Assistant, Mabel Muttiah, to brother Richard Morais 26/11/15]
>
> Shortly after this sinister message, further texts show that the same senior aid to the Attorney General was directly involved in the conspiracy to unlawfully remove the body from the hospital morgue, behind the back of Kevin's closest family members — cremating it on the very day that the courts had received the application for a second post mortem.
>
> *He [Richard Morais] asked me to find out from you if you would join him [tomorrow] in getting the remains of Kev fr the mortuary. Thank you' [Mabel Muttiah texting brother, David Morais, 16/11/15]*
>
> Such irregular interference by the very officials tasked with prosecuting this murder case raises serious questions about obstruction of justice on the part of the AG's office itself.
>
> The immediate concern is what motivated this determination of the new Attorney General to avoid a second, independent post-mortem, which had been demanded by the family according to their rights?

A The family say that they then immediately found themselves subjected to extraordinary and intolerable pressure from officials in the AG's office to waive this right and to cremate the body as soon as possible.

The leading voice in this matter was Mabel Muttiah, a former colleague who affected to be a close friend of Kevin's, although Charles has said that Kevin had B indicated that he never felt close to Mabel when alive.

In this capacity Muttiah started sending indirect texts to Charles, through family members, criticising the decision not to immediately cremate Kevin, which would have destroyed the possibility of gaining more information into his actual cause of death.

C On 22/09/15 Mabel texted a cousin 'I would have done the funeral differently ...' adding, entirely correctly, 'but who am I only an outsider'.

Despite her own acknowledgement that she had no such right to interfere, this officer from the AG's closest inner circle nevertheless started increasing her pressure D on the family.

Was someone pressuring her in turn?

Her next text on the same day continued to badger — criticising the family's decision to have a memorial service rather than cremating the body.

> E I wd have named the funeral programme as A HERO'S JOURNEY BACK TO HOME SWEET HOME ... Bring the remains to Nirvana — hve the wake for that particular night and next day in a chapel setting hve the svs with the priest ... singing they hymns and his favourite Amazing Grace., followed by the reading of the scriptures and the message ... a multi media show ... eulogies and his final hour would be the coffin dripped in the AGC and Malaysian flag — *then the* F *cremation*' bulldozed Mabel on 22nd September.

The messages only got worse, as Charles made clear he was sticking to his plan to bring an independent Australian expert to examine the body. Two days later Mabel was at it again, prodding the family that she had spoken to the police, as if they were not managing their own affairs in this respect:

G

> Btw I spoke to the police and they told me that the family of our late Kevin can claim his body anytime' [24.09.15]

Muttiah's next message just ten minutes later proved how closely she was directly in touch with the Attorney General himself in these negotiations with the family:

H

> Message from the AG to me ... Speak to ACP Munu about COD [Cause of Death]

Undeterred, Mabel was back badgering later that very evening and plainly at the behest of the highest authorities in her office:

I

> Please call ACP Munu at 10pm. He will give you and Charles all the explanation needed. Pis call and ask Charles to talk ... no harm ... I have passed all your concerns via Watsap to the AG, SG and the Chief of Staff. I am just like you all perplexed why all this is happening to dear Kevin' [21.38 pm 24/09/15]

And Mabel continued badgering on into the night. At 22.19 she texted again:

> Hve you all spoken to ACP Munu?

Then at 22.38:

> Kindly call him ...

Finally, when told the family did not want to make this call she started, late in the night, pressuring on another tack, which was the so-called 'golden hand shake' that the AG's office attempted to get Kevin's three brothers to sign up to.

So, late on that night of 24th September, having been rejected on the matter of contacting the police to be reassured on the cause of death, Mabel started up about the money. At half past eleven at night she again texted:

> No problem dear. Don't worry ... BTW tomorrow there will be a presentation by TSAG to the rep of the family. I also to need see the 3 brothers to give them sample of Declaration to be prepared by the brothers for the *gratuity, pension and golden hand shake*. So hope to see u tomorrow.

Sanctimoniously, she added:

> I alwz believe as public svt [servants] we shd provide assistance to the people., but I don't think than many people share that view ...

Indeed.

And who was separately texting Richard encouraging him to conspire against his brothers over this matter? None other than the AG's right hand woman Mabel.

Two months after Mabel had told Charles 'Okay I respect your decision' (not to take action until after a second post mortem), she was texting Richard that his brother should watch out for being a nuisance to her AG:

> Any updates on Suresh [Charles]? Has he told u anytg? The [AG's] chambers ur beginning to querie abthm, they seem to know he is mischievous an has other motives, they have read everythg on him an believe he is staling (sic) Kevin's cremation coz of other matters affecting him, *he shld be careful if I was hm*' [text message from AG's Special Assistant, Mabel Muttiah, to brother Richard Morais 26/11/15]

Once again Mabel acted the loving best friend when she texted David from the AG's office on 16th November to bring him in on the plot with Richard to remove Kevin's body from the hospital, without the knowledge of his senior brother Charles and the rest of the family:

> Dearest darling Bro David. Just receivd message from Bro Richard, he wants to remove Kev's remains and give a decent burial if time permits tomorrow. He asked me to find out from you if you would join him in getting the remains of Kev fr the mortuary. Thank you

This shocking overture from the right hand officer to the AG proves that there was official involvement at the highest level in the conspiracy to cheat the Morais family of their right to an independent post mortem — a right that was filed in the courts (after weeks of obstruction by the AG's office) on the very morning that the body was snatched from the mortuary.

However, Mabel and her colleagues were to be disappointed in their plan to entice the third brother into the conspiracy, presumably to lend further credibility to their actions. The supposed fence-sitter, David, did not want to be party to the deceit. He replied to Mabel firmly and correctly:

> This is a Morais family matter. You should run Richard's request by Charles too, as he is the oldest. No one can act or decide on their own. The decision to collect Kevin's remains must be unanimous amongst the brothers, it is not something that can be settle by a 'show of hands' or a 'quorum' [David Morais to Mabel 16.11.15]

Despite such a firm warning and rejection by David Morais, Mabel and the AG's office went ahead with supporting Richard's plans the following day.

Plainly backed by powers that be, Kevin's estranged and renegade brother Richard was allowed to turn up unannounced at the hospital and claim the body. He then had it immediately burnt behind his family's back, without any consent whatsoever.

This despicable act was achieved thanks to the support of the highest authorities and the craven failure of the hospital to insist that the correct parties should first be informed and give their consent.

[43] In dealing with this issue and having perused the first impugned defamatory article, I find that the case before me involves a 'false' innuendo, which has no secondary meaning to the written text. Due to this, there is no need to plead extrinsic facts as to the special meaning of the impugned words. As in this case before me, it does not involve a 'true' or 'legal' innuendo which would require extrinsic evidence to be pleaded in the form of extraneous particulars to be proven at trial. Instead, it involves a 'false' innuendo, which extends the ordinary and natural meaning of the alleged offending words.

[44] In this respect, the distinction between 'false' innuendo and 'true' or 'legal' innuendo has been sufficiently clarified by His Lordship Varghese George JC (as His Lordship then was) in *Yuvarani w/o Ravindra v Percetakan Kum Sdn Bhd & Ors and another suit* [2010] 6 MLJ 106 where His Lordship explained at pp 122 to 124 in the following manner:

> [31] This type of innuendo has been described in law books as a false innuendo and it arise from the alleged offending statements or could arise from even a combination of statements and picture (*CS Wu v Wang Look Fung & Ors* [1981] 1 MLJ 178). A 'false' innuendo should be contrasted with or distinguished from a 'true' or 'legal' innuendo that is statements with a secondary meaning. It is only in the latter case of a 'true' innuendo/secondary meaning that they have to be specifically pleaded and proved at trial by extrinsic evidence (Mohamed Azmi J in *Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor*).
>
> [32] Strictly when the words are defamatory in their natural and ordinary meaning, there is no need to plead an innuendo; only the defamatory meaning need be pleaded. The commentary in Malaysian Court Practice: High Court (LexisNexis) on O 78 r 3(1) of the Rules of the High Court 1980 confirms that only a 'true'

innuendo need be specifically pleaded and subsequently proved at the trial by extrinsic evidence as to the special meaning the words bear. The commentary cited above further notes, quoting the judgment of Holroyd Pearce LJ in *Grubb v Bristol United Press Ltd* [1963] 1 QB 309 and cited by Chua J in *R Murugason v The Straits Times Press (1975) Ltd* [1984] 2 MLJ 10 at p 14, as follows:

> Although it is not done in practice, I see nothing to prevent the plaintiff, if he chooses, from pleading what he contends to be the ordinary meaning of the words, either in a case where it is doubtful whether a defamatory inference is within the ordinary meaning or even where the words are plainly defamatory. He would merely be providing the defendant with the nature of his case on that point.
>
> If, even at that stage, the plaintiff made it clear that he was alleging no extension of meaning but only the ordinary meaning, the order would not apply and the plea would not be struck out for lack of particulars.

[33] This proposition is also supported by the decision in *Allsop v Church of England Newspaper Ltd and others* [1972] 2 QB 161 cited by the plaintiff's counsel in his submissions in reply.

[34] I therefore reject the submissions made by counsel for the second, third and fourth defendants in his written submissions in reply that I should pursuant to O 78 r 3(1) of the RHC 1980 hold that the plaintiff has failed to fully plead particulars of innuendos relied on and secondly, that the plaintiff had not lead any evidence on the pleaded innuendo to show its meaning as claimed by the plaintiff. There are no 'slang, or technical or foreign' words involved here that require extrinsic evidence to derive its defamatory meaning. The translations into Bahasa Malaysia are direct and comprehensible of the meaning of the offending statements in Tamil. As observed above, the defendants did not lead any evidence to show the translations did not bear the meaning as translated into Bahasa Malaysia (P4 and P3).

[35] In law therefore, only a 'true' innuendo with a secondary meaning (relied on by the plaintiff) is required to be set out as particulars and proved at trial; not a 'false' innuendo which is an extension of the ordinary and natural meaning of the alleged offending words.

[45] From this perspective, in order to determine whether the impugned words are capable of conveying the defamatory meaning almost immediately without the use of extraneous knowledge of some particular meaning appearing extrinsic to the clear wordings of them, one must read the alleged defamatory words to understand what they suggest to the mind and understanding of a layperson reading them.

[46] Upon reviewing the plaintiff's amended statement of claim, I find that the wordings in the first impugned defamatory article not only convey the ordinary and natural meaning by themselves but also an implied or indirect meaning, which in any event does not require the existence of extrinsic facts in a particular area that are difficult to comprehend or acquire. Rather, this meaning can be understood in the ordinary sense and in the literal

A understanding of the words' most basic and fundamental meaning. As a result, there is no need to take the article metaphorically in order to understand its intended meaning. The susceptibility of readers will not be different from each other after reading the first impugned defamatory article. Further evidence of this is provided by the public's comments following the reading of the first
B impugned defamatory article.

[47] Having reached this conclusion, I will now proceed to determine whether the first impugned defamatory article is defamatory.

C

[48] The merits of this defamation action must be determined in two stages. The plaintiff must prove that three elements are present in the impugned articles as part of the first stage test. She must first prove that the articles are defamatory. Secondly, she must prove that the articles are about her. The third step is to prove that the articles were published. Upon satisfying the first test,
D the burden of proof shifts to the defendant in the second stage, who must prove that the alleged articles are not defamatory. It is relevant to emphasise here that the second and third elements of the first stage are not in dispute, and therefore I will proceed to examine the issue of whether the articles can constitute
E defamation.

[49] In the Court of Appeal case of *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371, His Lordship Gopal Sri Ram JCA (as His Lordship then was) laid out the above-mentioned test and ingredients in a
F defamatory action, in addition to clarifying that the question of whether the words complained of are defamatory or not is a matter of fact that is determined by the specific circumstances of each case. This is His Lordship's analysis of the law at pp 374–375:

> It cannot, I think, be doubted that the first task of a court in an action for
G defamation is to determine whether the words complained of are capable of bearing a defamatory meaning. And it is beyond argument that this is in essence a question of law that turns upon the construction of the words published. As Lord Morris put it in *Jones v Skelton* [1963] 3 All ER 952 at p 958:
>
> > The ordinary and natural meaning of words may be either the literal meaning or
> H it may be an implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words (see *Lewis v Daily Telegraph Ltd* [1963] 2 All ER 151). The ordinary and natural meaning may therefore include
> I any implication or inference which a reasonable reader, guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction, would draw from the words. The test of reasonableness guides and directs the court in its function of deciding whether it is open to a jury in any particular case to hold that reasonable persons would understand the words complained of in a defamatory sense.

> In my judgment, the test which is to be applied lies in the question: do the words published in their natural and ordinary meaning impute to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on his part? If the question invites an affirmative response, then the words complained of are defamatory (see *JB Jeyaretnam v Goh Chok Tong* [1985] 1 MLJ 334) Richard Malanjum J, in an admirable judgment in *Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393, collected and reviewed the relevant authorities upon this branch of the subject and I would, with respect, expressly approve the approach adopted by him.
>
> Having decided whether the words complained of are capable of bearing a defamatory meaning, the next step in the inquiry is for a court to ascertain whether the words complained of are in fact defamatory. This is a question of fact dependent upon the circumstances of the particular case. In England, libel actions are tried by judge and jury and the question is left for the jury to determine. However, in this country, libel actions are tried by a judge alone, he is the sole arbiter of questions of law as well as questions of fact. He must, therefore, make the determination. In the present instance, it is quite apparent that it is as a matter of pure fact that the article defames the appellant. It literally calls him a cheat and a liar. There can, in my opinion, be no dispute that the appellant was in fact libelled. I am, therefore, unable to agree with the opposite conclusion arrived at by the learned judge who tried the action.

[50] In light of the legal test referred to above, I will begin my analysis by addressing the first impugned defamatory article.

[51] According to the defendant, the first impugned defamatory article was published sometime in October 2015 after she was contacted by Charles Suresh Morais ('Charles Morais'), the eldest brother of the late Dato' Anthony Kevin Morais. It is alleged that Charles Morais informed the defendant that he was suspicious of the death of the late Dato' Anthony Kevin Morais, leading him to seek a second postmortem. According to Charles Morais, his suspicion arose because he honestly believed that the late Dato' Anthony Kevin Morais was then drawing up a charge sheet against the then Prime Minister of Malaysia. Moreover, his findings further indicated that although the post-mortem report stated that the late Dato' Anthony Kevin Morais was found with his arms tied behind his back with wire, however, the photographs clearly showed that the late Dato' Anthony Kevin Morais was found in a foetal position with his arms unbound in front of him. These photographs were taken after the remains were removed from the cement drum.

[52] According to the defendant, her case essentially boils down to this. The first impugned defamatory article was written by the defendant after she received necessary information from her sources, Charles Morais and Americk Sidhu and which the defendant believed to be true. At the time, Americk Sidhu was representing Charles Morais.

[53] Additionally, the defendant asserts that reading the text messages between Charles Morais, David Ramesh Morais ('DW1'), Priya Ann Louis ('DW2') and Americk Sidhu ('DW3') led the defendant to conclude or believe that the plaintiff was actively involved in encouraging, pressuring and arranging for the late Dato' Anthony Kevin Morais' family to collect his remains, despite the fact that the plaintiff allegedly knew at the material time that the family was inclined to have a second post-mortem conducted. As a reference, David Ramesh Morais was the brother of the late Dato' Anthony Kevin Morais, while Priya Ann Louis was the cousin of the late Dato' Anthony Kevin Morais.

[54] On this issue, even if assuming that there appear to be some suspicious elements, and in any case, there does not appear to be any independent evidence supporting it before me, I find that there is no justifiable connection between the plaintiff and any alleged conspiracy theory. It is one thing to be suspicious, but quite another to pin the suspicion on the plaintiff. According to the evidence before me, it was just a coincidence that the plaintiff was then the Special Officer to the then Attorney General, which put her in the position of serving as a liaison to facilitate things. Her role as an intermediary between the deceased's family with the Attorney General's Chambers and the Prime Minister's representative can be seen from the evidence.

[55] It is beyond doubt that disseminating news involves some degree of responsibility. Journalists must exercise control over competing for scoops and the accuracy of the stories that they are about to publish. Although the source of the news remains important, the question remains as to how one can connect the dots if there are no lines to connect the dots in the first place. This is what I find to be happening in the case before me. To what extent do the facts and the law allow the defendant to believe the truthfulness of the information to which she has been privy based solely on the exchange of messages between the parties that I have previously mentioned, which are also the subject of the defendant's first impugned defamatory article? Upon reading the first impugned defamatory article as a whole, I could not understand how an allegation against the plaintiff could have even arisen.

[56] Based on the above and after carefully reviewing the parties' submissions, I conclude that the first impugned defamatory article is clearly defamatory to the plaintiff. It is not necessary to read between the lines of such an article to determine whether or not it contains defamatory elements. The article clearly suggested that the plaintiff was involved in a conspiracy of some kind at the highest level to cheat the family of the late Dato' Anthony Kevin Morais of their rights to a second independent post-mortem report. According to the article, this alleged despicable act was carried out after being backed by the powers that be and with the support of the highest authority given that the

remains were snatched the same morning as the application to have the remains postmortem for the second time was filed. However, the question remains: Where is the proof of the existence of the 'powers that be', if they exist at all?

[57] Moreover, since I was not provided with sufficient evidence to support the assertion that the defendant conducted research and investigation on this matter before proceeding to publish the article, I am not in a position to hold that the article is not defamatory, given that I was unable to relate the messages the defendant received to the conclusions contained in the first impugned defamatory article. On the basis of those messages alone, I cannot conclude that the plaintiff engaged in bullying and attempted to bribe the family. As a result, what the defendant read between the lines is clearly unjustifiable. There is no evidence that the plaintiffs messages to the relevant parties constitute obstruction of justice. Furthermore, having a proposal to conduct a funeral differently cannot be equated to pushing for the cremation of the late Dato' Kevin Anthony Morais in order to avoid a second post-mortem. No matter what the circumstances, the plaintiff should also not be held responsible for disputes between family members. Despite the fact that the article refers in great detail to such family disputes, I do not intend to address them here in any further detail.

Whether the defendant is liable for any third-party publications pleaded by the plaintiff?

[58] The plaintiff claims that the defendant is responsible for the publications of third parties after the first impugned defamatory article went viral and was subsequently republished by various other third-party media outlets including *Asia Sentinel*, *Hornbill Unleashed Blog* and *The Malaysian Insider*.

[59] Against this backdrop, the plaintiff relies on *Gatley On Libel and Slander* (12th Ed), which outlines the general principles of responsibility for publication. As stated in para 7.010:

> General principles: responsibility for publication. The person who first spoke or composed the defamatory matter (the originator) is of course liable, provided he intended to publish it or failed to take reasonable care to prevent its publication. However, at common law, liability extends to any person who participated in, secured or authorised the publication (even the printer of a defamatory work) though this was qualified by special rules for mere distributors, who could escape liability by showing lack of knowledge of the defamatory nature of the publication and the exercise of reasonable care.

[60] As to whether the defendant is liable for any publications produced by third parties, I find that the defendant is not liable for the chain reaction of the

publication which is, in any event, outside the defendant's control. In this context, the defendant's liability is limited to publication that she directly authored and published. In general, this position appears to align with the passage quoted above from *Gatley on Libel and Slander* (12th Ed).

[61] Apart from that, it should be noted that none of the republications of the first impugned defamatory article made by *Asia Sentinel*, *Hornbill Unleashed Blog* and *The Malaysian Insider* had published the entire article as written by the defendant. In such a case, if any of them paraphrased the entire article with the intention of summarising it, and the result was to create a new meaning from that exercise which was contrary to the original meaning of the first impugned defamatory article, then any further issues should be addressed to them and not the defendant.

Whether the second and third impugned defamatory articles constitute defamatory remarks which are defamatory to the plaintiff? If yes, is the defendant liable for the alleged defamatory remarks that were published in the Malaysia Kini and Free Malaysia Today?

[62] A further concern of the plaintiff is that after the publication of the first impugned defamatory article, the defendant propagated a falsehood by claiming that the plaintiff's defamation suit sought compensation for loss of earnings. It was alleged that this action was committed pursuant to the two articles published by *Malaysia Kini* and *Free Malaysia Today*, now referred to as the second and third impugned defamatory articles.

[63] This, according to the plaintiff, is a blatant misrepresentation made by the defendant in order to further tarnish her reputation, as evidenced by public comments on the second and third impugned defamatory articles. Due to the fact that the defendant did not take into consideration whether the statements were true or false, it is argued that she must be held liable for further aggravated damages as this would constitute malice on her part.

[64] My anxious consideration of this issue has led me to the following conclusion. Based on my observations, it appears that the second and third impugned defamatory articles were not written by the defendant herself. Further analysis of the plaintiffs arguments indicates that the plaintiff is implying that there has been oral defamation allegedly uttered by the defendant. This being the case, it is trite to state that the plaintiff bears the burden of proving the claim. With this in view, there is a question that persists in my mind regarding who said what. Was it the defendant who gave the interview to that effect to *Malaysia Kini* and *Free Malaysia Today*, or were their reporters who derived such an understanding on their own? Clearly, this is insufficient to tie up the defendant with the two articles in the manner in which

the plaintiff is attempting to do. Therefore, to resolve this issue, the only relevant factor for my consideration is the calling of those reporters since the plaintiff still has the burden of proving this issue. Unfortunately, the plaintiff has not accomplished this.

[65] In this respect, the case of *Lembaga Kemajuan Tanah Persekutuan & Anor v Dr Tan Kee Kwong* [2012] 4 MLJ 622 provides useful guidance, as Her Ladyship Zabariah Mohd J (as Her Ladyship then was) found that when proving that a party published defamatory words or caused the publication of defamatory words, the reporter to whom the party uttered the defamatory words must be called in to testify. The following observations were made by Her Ladyship at pp 649–651:

> WHETHER THE DEFAMATORY WORDS WERE UTTERED BY THE DEFENDANT
>
> [85] Slander in the law of defamation is oral defamation as opposed to libel which is written defamation. Allegation is that there was oral defamation when the defendant allegedly said these to Faisal Zakaria.
>
> [86] Para 6 of statement of claim is referred at p 24 of the *ikatan* A. This is the written defamation which is libel and the allegation against the defendant is that he caused or permitted to be published these words.
>
> [87] At para 7 of the statement of claim it is pleaded that the words were uttered and published by the defendant.
>
> [88] In the issues to be tried, the first issue is whether the defendant uttered the words to Faisal.
>
> [89] It is the burden of the plaintiff to prove that the defendant published or caused to be published the alleged defamatory words.
>
> [90] For there to be publication, the plaintiff must prove that there must be communication of the words to third party ie Faisal Zakaria, the reporter.
>
> [91] There cannot be defamation of a plaintiff if the impugned words were said to him, or published to him. There must be a third party involved.
>
> [92] In the present case, Faisal Zakaria, the reporter was not called to testify. This is crucial to the case.
>
> [93] The plaintiffs' witnesses could not positively confirm whether the defendant did utter the defamatory words to Faisal Zakaria and subsequently, caused it to be published, as they were never at the interview which the defendant gave to Faisal Zakaria.
>
> [94] After the plaintiffs' witnesses were called to testify, the plaintiffs' counsel applied for a short adjournment in view that a subpoena was applied for in an attempt to secure Faisal Zakaria to testify. However the application for an adjournment was refused as the subpoena was applied on the hearing date at the eleventh hour when the existence of Faisal Zakaria was well within the knowledge of the plaintiffs ever since the writ and statement of claim was filed.
>
> [95] Only Faisal Zakaria can throw light of whether the defendant did utter what he

is alleged to have said (refer to s 60(1)(b) of the Evidence Act 1950).

[96] Apart from the failure to call Faisal Zakaria, the plaintiff failed to prove that the defendant was responsible for the publication of the report. What has been produced in evidence is bundle B p 2 which has been marked as P2. It is trite law that newspaper report is hearsay evidence. In *Karpal Singh v Sultan of Selangor* [1988] 1 MLJ 64, Abdul Hamid Omar CJ (Malaya) said at p 65:

> ... I ... observe that the sole foundation of the originating summons is the statement allegedly made by the Sultan as reported in the *New Straits Times* and *The Star* newspapers on 27 July 1987. There is no affidavit before the court affirmed to by the reporter concerned stating that he heard the Sultan made such statement. The press reports of what the Sultan is reported to have said would appear to be inadmissible as hearsay. The fact that the Sultan has not contradicted the press reports does not, in my view, make the slightest difference for it is well established that inadmissible evidence does not become admissible by reason of a failure to object.

[103] From the start the plaintiff were well aware that they have to prove this issue by calling Faisal Zakaria or anyone who was there who heard the defendant uttered the said words. All of the plaintiffs' witnesses said they were not at the interview which the defendant had with Faisal Zakaria.

[104] It is trite law that a hearsay evidence remains as hearsay although parties did not object.

[105] Therefore the failure of the plaintiff to call Faisal Zakaria proves to be fatal to the plaintiffs' case. It is not proven that the defendant did utter the defamatory words to a third party.

[106] Clearly the plaintiffs have failed to prove an essential element of the tort ie that the defamatory words were uttered by the defendant and that he had caused the same to be published in *Suara Keadilan.*

[66] In view of this, I conclude that the second and third impugned defamatory articles do not sufficiently demonstrate that these were the defendant's exact quotations.

[67] In any event, on further examination of this issue, I do not consider these comments made in the second and third impugned defamatory articles to be defamatory remarks which are defamatory of the plaintiff. On this point, I find that even if there was some form of misrepresentation of an utterance, the fact remains as to the true and exact nature of the plaintiff's claims. In this regard, if one examines the source of the claim, it was never a claim for loss of earnings. In fact, it was the plaintiffs right to pursue such a claim due to the publication of the first impugned defamatory article that prompted her to initiate it.

Whether the defendant is entitled to invoke the defences of justification, fair comments, qualified privilege and the Reynolds public interest defence?

[68] Having found the first impugned defamatory article to be defamatory, I will now address the defendant's defences, the first of which is the defence of justification.

[69] In the first place, it is the defendant, who is being held accountable for the defamatory statements, who has the burden of proving this type of defence. In this regard, the Federal Court case of *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86 provides the basis for such a legal position. On behalf of the Federal Court, His Lordship Salleh Abas FCJ (as His Lordship then was) stated the following at p 87:

> The appellants in the present appeal relied on justification and fair comment. Therefore, the burden of proving these defences rests entirely upon them (Gatley on *Libel and Slander* (7th Ed) paras 351 and 354).

[70] On this defence, I find that based on my findings above, they clearly deny the defendant the right to raise the defence of justification. As a result of my examination of the messages between the plaintiff and those other parties which were allegedly the basis for the defendant's conclusion that led to the publication of the defamatory article, it appears to me that there is no sinister motive that could be derived from them in the manner described by the defendant. Furthermore, the plaintiff, as someone from the Attorney General's Chambers, was entitled to clearly express her views that no foul play was involved in the death of the late Dato' Anthony Kevin Morais except for the crime committed by Dr R Kunaseegaran and the other accused in the criminal trial. I find that this appears to be her state of mind at the time of the exchange of messages.

[71] A further indication of this is the fact that all those accused of murder have been found guilty not only by the High Court but also by the Court of Appeal. To this end, the first impugned defamatory article appears to have been published without any basis. Further complicating matters was the discovery that one of the messages that the defendant claimed had been sent by the plaintiff and described by the defendant as a naked threat had, in fact, been sent by Richard Morais. Apparently, the threat involved sending a message to David Morais about Charles Morais' mischievousness, which was intended to stall his brother's cremation, and therefore, Charles Morais should be cautious, as the AGC began to question his conduct. Although it is true that the defendant has later made a note about this in the article itself, but this was only done some two and a half years after the publication of the first impugned defamatory article. By then, the damage has been done.

[72] This conclusion can be supported by the case of *Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393. In this case, His Lordship Richard Malanjum J (as His Lordship then was) held that

the defendant must establish the truth of the material statements in order to invoke the defence of justification. His Lordship stated the following at p 404:

> In a defamation action, the defence of justification is a complete defence if it succeeds. And the question of malice or bad faith does not arise. But in order to succeed in the defence of justification a defendant must establish the truth of all the material statements in the words complained of which may include defamatory comments made therein. And in order to justify such comments, it is necessary to show that the comments are the correct imputations or conclusions to be drawn from the proved facts.

[73] It can be concluded from the above that the defendant has failed to justify the publication of the first impugned defamatory article.

[74] It is further argued by the defendant that since this is a matter of 'public interest', it thereby attracts *Reynold*'s defence of qualified privilege as being one of 'public interest.' As such, it has been argued that the defendant is under a duty to communicate important information on matters of public interest, even if the information later turns out to be untrue and defamatory.

[75] In *Sivabalan a/l P Asapathy v The New Straits Times Press (M) Bhd* [2010] 9 MLJ 320, His Lordship Zawawi Salleh J (as His Lordship then was) explained that to assert the defence of qualified privilege, two criteria must be met. In the first place, there must be a matter of public interest, and in the second place, the entire process of generating the article must be fair and responsible. His Lordship observed at pp 340 and 341:

> [39] Reverting back to the case at hand, for the defence of qualified privilege in the form of the *Reynolds* privilege to apply, two requirements must be shown to exist, namely: (a) that the publication concerned a matter of public interest; and (b) that the steps taken to gather, verify and publish the information were responsible and fair ('responsible journalism') (see *Duncan and Neill on Defamation* (3rd Ed), para 17.07, pp 205-206).
>
> [41] A matter is said to be of 'public interest' if the public had an interest in matter, as opposed merely to being interested in matters. Being interested in matter would refer to matters which were merely titillating or salacious or gossipy. Matters which were of public interest, on the other hand included those which affect the public in terms of governance of their country, their safety, security and right to judge public representatives fairly on the basic of real information.

[76] An adequate discussion of this topic would not be complete without first tracing its origins. The House of Lords in *Reynolds v Times Newspapers Ltd and others* [2001] 2 AC 127 laid out ten established legal principles when dealing with the defence of qualified privilege. As suggested by Lord Nicholls at p 205, the following matters should be considered in a non-exhaustive manner:

> Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only. 1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. 2. The nature of the information, and the extent to which the subject matter is a matter of public concern. 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. 4. The steps taken to verify the information. 5. The status of the information. The allegation may have already been the subject of an investigation which commands respect. 6. The urgency of the matter. News is often a perishable commodity. 7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed.
>
> An approach to the plaintiff will not always be necessary. 8. Whether the article contained the gist of the plaintiffs side of the story. 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. 10. The circumstances of the publication, including the timing.
>
> This list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case. Any disputes of primary fact will be a matter for the jury, if there is one. The decision on whether, having regard to the admitted or proved facts, the publication was subject to qualified privilege is a matter for the judge. This is the established practice and seems sound. A balancing operation is better carried out by a judge in a reasoned judgment than by a jury. Over time, a valuable corpus of case law will be built up.

[77] In light of the ten established legal principles as outlined above, I conclude that there was no justification for the defendant to publish the first impugned defamatory article in the first place. Not only did the defendant not have any personal knowledge of the issues that she was addressing in her article, but it is also puzzling how such a determined conclusion could be drawn from reading the exchange of messages between the plaintiff and the other parties described in the first impugned defamatory article.

[78] In addition, not only did the defendant fail to verify the information, arguing that she was not in good standing with the Malaysian government, but I did not find any urgency in disseminating the news to the public. Based on the nature of the first impugned defamatory article written, it would appear that the information contained therein does not constitute a perishable commodity. There is no scoop regarding, for example, someone suspected of involvement in a terrorist act who is about to go on a rampage or an activity that poses a risk to the public at large. Considering for a moment that the article written by the defendant was true, the nature of the story still does not immediately affect the general public in the sense that it is not something perishable that requires immediate dissemination of information.

[79] On top of that, it must be remembered that the remains were discovered twelve days after the disappearance of the late Dato' Anthony Kevin Morias, which discovery was made possible after Dr R Kunaseegaran was arrested as the main suspect. All of this would have changed the status of the information, and nothing would have suggested the defendant's version of events.

[80] It is also clear from the above findings and analysis that the defence of fair comments cannot be maintained. On this matter, I am referring to the case of *Dato Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor* [2014] 4 MLJ 242 in which His Lordship Abang Iskandar JCA (as His Lordship then was) held that the comment must be based upon true facts which the defendant must prove, and the defence of fair comment will not succeed if the complainant can demonstrate that the publication was made maliciously. The following observations can be found at p 258 of His Lordship's judgment:

> [50] The law on the defence of fair comment is that if a defendant can prove that the defamatory statement is an expression of opinion on a matter of public interest and not a statement of fact, he or she can rely on the defence of fair comment. The courts have said that whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on or what may happen to them or to others, then it is a matter of public interest on which everyone is entitled to make fair comment.
>
> [51] The comment must be based on true facts which are either contained in the publication or are sufficiently referred to. It is for the defendant to prove that the underlying facts are true. If he or she is unable to do so, then the defence will fail. As with justification, the defendant does not to have to prove the truth of every fact provided the comment was fair in relation to those facts which are proved. However, fair in this context, does not mean reasonable, but rather, it signifies the absence of malice. The views expressed can be exaggerated, obstinate or prejudiced, provided they are honestly held. If the claimant can show that the publication was made maliciously, the defence of fair comment will not succeed.

Was the defendant malicious in publishing the words complained of?

[81] As for malicious falsehood, I find that the plaintiff has met all three requirements to support her claim and that the defendant has failed to prove there was no malice in the publication of the first impugned defamatory article.

[82] In this regard, although the defendant had stressed that she had not even known the plaintiff personally, I still find that based on the nature and effect of the first impugned defamatory article as well as the manner in which the plaintiff was being portrayed in it along with the publication of two photographs of the plaintiff alongside her name card, malice can be inferred on the basis of these elements and from the earlier findings, including recklessness and unreasonableness in coming to such a conclusion as the defendant did via

the first impugned defamatory article, which was not based on a fair belief in the truthfulness of the statement, thereby adversely affecting the plaintiff's reputation.

[83] My position on this issue is supported by the decision of the Court of Appeal in *Liu Thian Leong & Ors v Jee Nyen Chong (sued in his personal capacity and as an office-bearer of the Jawatan Kuasa Dewan Siburan (Siburan Hall Committee) under the provision of s 9(c) of the Societies Act 1966) & Ors* [2022] 1 MLJ 420. His Lordship Ravinthran JCA stated the following at p 453 regarding the meaning of actual or express malice:

> [68] It is trite law that actual malice will disentitle a defendant from availing the defence of qualified privilege. The burden to prove actual or express malice is on the plaintiff. The requirement to prove express malice was lucidly explained in the case of *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173 by the Supreme Court in the following passage:
>
> > The protection afforded by the law to a publication made on an occasion of qualified privilege is not an absolute protection but depends on the honesty of purpose of the person who makes the publication. If he is malicious, that is, if he uses the occasion for some other purpose than that for which the law gives protection, he will not be able to rely on the privilege. If the publication takes place under circumstances which create a qualified privilege, in order to succeed the plaintiff has to prove express malice on the part of the defendant.
>
> [69] As for the meaning of actual or express malice, in the same case, the Supreme Court defined it as follows:
>
> > Broadly speaking, express malice means malice in the popular sense of or desire to injure the person who is defamed. To destroy the privilege, the desire to injure must be the dominant motive for the defamatory publication.
> >
> > Knowledge that it will have that effect is not enough if the defendant is nevertheless acting in accordance with a sense of duty or in bona fide protection of his own legitimate interests. The mere proof that the words are false is not evidence of malice, but proof that the defendant knew that the statement was false or that he had no genuine belief in its truth when he made it would usually be conclusive evidence of malice. If the defendant publishes untrue defamatory matter recklessly without considering whether it be true or not, he is treated as if he knew it to be false. In ordinary cases, what is required on the part of the defamer to entitle him to the protection of the privilege is honest belief in the truth of what he published. But if he was moved by hatred or a desire to injure and used the occasion for that purpose, the publication would be maliciously made even though he believed the defamatory statement to be true.

[84] Given this context, it seems trite that the existence of malice further undermines the defence of qualified privilege that the defendant attempted to grasp.

If the defendant is found liable, what is the quantum of damages that can be awarded to the plaintiff?

[85] Having found the above, I do not once question the defendant's right to disseminate news or information for the greater good of the public, or for that matter any issue of public interest. In light of these findings, however, someone in the position of the defendant would need to reevaluate the conclusions drawn based on the veracity of the source of the information as well as the express meaning of the information rather than reading between the lines to develop such an injurious opinion in the first place. The old adage holds true that as long as there is a justification for disseminating the news, after taking into account not only the truthfulness but also, amongst others, the security or sensitive aspects in accordance with applicable laws, then one can justify their position accordingly.

[86] At the risk of repeating the obvious, my main finding is that the plaintiff is not entitled to any compensation for damages resulting from the defamatory article as a result of the failure to provide the certified translation of the first impugned defamatory article in Bahasa Melayu in the statement of claim. Nevertheless, based on my hypothetical academic findings on the above merit-based issues, I must proceed to the issue of the quantum of damages that may be awarded to the plaintiff under this scenario. In this aspect, I continue to take the same approach to ensure that if this matter proceeds on appeal, I must be seen as being thorough in my examination of the issues posed to me for the Court of Appeal's benefit, should the Court of Appeal choose to examine this additional factor as well.

[87] On this issue, it is trite that in defamation cases, the damages that occurred to the plaintiff are presumed to be true in law and therefore there is no requirement to prove damages as it would naturally follow that such defamatory words would harm the plaintiff's reputation.

[88] A discussion of the above legal position has been conducted in the case of *Datuk May Phng @ Cho Mai Sum (suing as chairman, committee member and representative of Persatuan Penganut Buddha Rumah Kechara Malaysia ('Kechara House'), an association registered under the Societies Act 1966 and in the capacity of representative of Kechara House and/or all Kechara House's members) & Ors v Tan Pei Pei* [2018] 11 MLJ 741. In this regard, the following observations were made by His Lordship Kamaludin Md Said J (as His Lordship then was) at p 750:

> [24] It is trite law that a libel is actionable per se. Therefore, the damages caused to the plaintiffs is presumed in law and the plaintiffs do not have to show any proof that the said email has caused any damages to the plaintiffs in order to claim for any damages from the defendant. See *Yeo Ing King v Melawangi Sdn Bhd* [2016] 5 MLJ

631 at p 661 where it was held that:

> [78] Libel is actionable per se, that is to say, there is no need to prove actual damage for 'the law presumes that some damage will flow in the ordinarv course of things from the mere invasion of his absolute right to reputation': Gatley on *Libel and Slander* (10th Ed) at p 983. (Emphasis added.)

[25] The plaintiffs must be compensated and the next question is how much would be the quantum of damages for the loss of reputation. In *Datuk Seri Utama Dr Rais binYatim v Amizudin bin Ahmat* [2012] 2 MLJ 807, it was held that a particular libel case cannot be equated with other libel cases. Each libel case is unique and has its own particular and peculiar facts.

[26] In *Kesatuan Kebangsaan Pekerja-Pekerja Bank & Ors v The New Straits Times Press (M) Bhd & Ors and another suit* [2013] 8 MLJ 199, it was held that the tort of libel has been recognised as actionable per se. Thus where a personal plaintiff proves publication of a false statement damaging to his reputation without lawful justification, he need not plead or prove special damage in order to succeed (see also *Cheong Chark v Gammon (Malaya) Ltd* [1939] 1 MLJ 65).

[89] As a prelude to a discussion of quantum, it becomes necessary to determine what kind of injury the plaintiff is suffering from such defamatory statements. This question is answered in the judgment of His Lordship Harmindar Singh JC (as His Lordship then was) in *Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor* [2010] 2 MLJ 492 in which His Lordship made a detailed analysis of the nature of the injury suffered by a person who has been defamed, which was none other than injury to his or her reputation. In His Lordship's analysis at p 498, His Lordship elaborates on this in great detail:

> [1] This case is about a man's reputation. What is reputation? There is no precise concept or definition. According to the *Oxford English Dictionary*, reputation means 'what is generally said or believed about a man's character or standing'. But reputation is different from character in that a person's character is what he or she in fact is whereas a person's reputation is what other people think he or she is (see *Plato Films Ltd & Ors v Speidel* [1961] AC 1090 at p 1138 per Lord Denning). In theory therefore, an unrevealed scoundrel may actually have an excellent reputation.
>
> [2] In any discussion of reputation, there is the customary or some say obligatory reference to Shakespeare's characterisation of 'good name' as the 'immediate jewel' of the soul (see W Shakespeare, *Othello*, Act III Scene iii). The 'purse' was 'trash' when compared to the value of a 'good name'. Some believe that reputation is a form of honour (see RC Post, *The Social Foundations of Defamation Law: Reputation and the Constitution* [1986] 74 California Law Review 691). So dishonour or loss of face is an absolute fall from grace. As Shakespeare depicted:
>
> Mine honour is my life, both grow in one
>
> Take honour from me and my life is done.
>
> W Shakespeare, *Richard II*, Act I Scene I

A [3] Reputation has also been equated with the protection of dignity. In *Rosenblatt v Baer* [1966] 383 US 75, Stewart J observed:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being — a concept at the root of any system of ordered liberty.

B

[4] There is therefore no doubt as to the value of reputation even if articulating it or its limits with precision is complicated. In terms of its practicality and relation to modern life, Lord Nicholls in *Reynolds v Times Newspapers Ltd and others* [2001] 2 AC 127 at p 201 asserted:

C

> Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged forever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of his reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed choice, the electorate needs to be able to identify the good as well as the bad.

D

E

[90] On the basis of the evidence presented to me and utilising the above authorities as a yardstick for determining this issue's outcome, it seems to me that the first impugned defamatory article was published worldwide, which clearly damaged and gravely injured the plaintiff's reputation and integrity, not only as a judicial officer but also as a decent human being, which in turn affected the public office she represents. Even without reading the first impugned defamatory article, the words 'connived' and 'exclusive expose' appearing in the title were damaging enough, not to mention that they successfully served as clickbait to attract readers.

F

G

[91] Consequently, the plaintiff was subjected to public ridicule, odium, contempt, and scandal, as reflected in the public comments, which I do not intend to reproduce them here given the nature of the comments made. As a result of this and after listening to the plaintiff's testimony, I do not doubt that they have caused profound emotional and mental distress to the plaintiff. Despite this, there was no alternative for the plaintiff but to continue her duty as a judge until retirement while also keeping in mind that the public was judging her. There has been nothing short of a devastating impact on her personal and professional life.

H

I

[92] As it stands, there can be no restoration of the plaintiff's past life or the suffering she has endured over the years. A

[93] When formulating the quantum of damages, it is important to take into account the following observations made by His Lordship Gopal Sri Ram JCA (as His Lordship then was) in *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun & other appeals* [1995] 2 MLJ 493, where His Lordship analysed the following at pp 524 and 525: B

> With that, I now turn to consider the approach taken by the learned judge in this case, who, when he came to assess damages, had this to say ([1995] 1 MLJ 39 at p 63): C
>
> > In my opinion, each case must be judged on its own particular facts and on its own merits. In the present case a very serious libel has been perpetrated on the plaintiff. The defendants calculated that the prospect of material advantage from publishing the said articles outweighed the prospects of material loss. D
> >
> > Therefore, bearing in mind the principles applicable in the assessment of damages and in considering all the various factors, including the following:
> >
> > (1) the position and standing of the plaintiff;
> >
> > (2) the gravity and seriousness of the libel; E
> >
> > (3) the mode and extent of the publication;
> >
> > (4) the mental distress, hurt, anxiety and mental anguish caused to the plaintiff as a result of the libel;
> >
> > (5) the uncertainty undergone in litigation; F
> >
> > (6) the conduct of the defendants from the time of the libel down to the very moment of the verdict; and
> >
> > (7) the absence or refusal of any correction, retraction or apology, this court finds that the award must also be sufficient to convince any person of the baselessness of the libel and act as a necessary and sufficient signal to the public at large of the full vindication of the plaintiffs reputation both in Malaysia and internationally. Taking the above into consideration, I am of the view that the damages to be awarded against each defendant must be treated individually. G
>
> The learned judge then proceeded to take into account all the factors alluded to in the passage in his judgment that I have reproduced and awarded those damages which I have set out earlier in this judgment. He also took into account the conduct of each appellant. The learned judge therefore gave due consideration to all those factors that are relevant to the assessment of damages in a case such as this. His judgment has been reported in [1995] 1 MLJ 39. For that reason, I do not propose to regurgitate his careful analysis of the evidence as against each appellant and their conduct. H I

[94] Further, His Lordship Abu Mansor JCA (as His Lordship then was)

opined at pp 531 and 532 in this case that the courts have the right to establish their own values and will not take lightly when someone's reputation is harmed with impunity in order to send a clear message that libel does not come cheap:

> All in all, the award of damages is in the discretion of the learned judge. For myself, I wish to say that the learned judge had considered the quantum carefully having regard to the position of the plaintiff in his world. I cannot say that the learned judge was in error in law as to justify us interfering with the judgment. Speaking for myself, I fully endorse what had been meted out by the learned judge. It is not excessive. I think the court has to take a stand and deliver the message to all journalists and the media alike that they must act responsibly. They ought to know that they have a large following, and that the reading public hold them in high esteem and has the tendency to accept what is written as gospel truth. If the appellants have to write and publish they should, therefore, have acted with responsibility. I support this assessment or measure of damages by the learned judge as a deterrent to those who harbour the notion that they can malign with impunity or do it with a hope of getting off lightly, and I associate myself with what had been expressed by my brother judge, Gopal Sri Ram JCA, that there is absence of any authority or guideline from which measure of damages can be followed in libel cases. I associate myself with what had been stated, that this court is free to set its own values and would not look lightly when a person's reputation had been maligned or injured with impunity. I agree that a strong signal need be sent that libel is not cheap. As I have said, we reject this appeal for reasons given above.

[95] In a later judgment, His Lordship Gopal Sri Ram JCA (as His Lordship then was) further noted that several factors should be considered when assessing general damages, although in no way exhaustive. This view was reflected in His Lordship's judgment in the case of *Chin Choon @ Chin Tee Fut v Chua Jui Meng* [2005] 3 MLJ 494 at p 498:

> 5. In *Defamation Law, Procedure & Practice* by Price & Duodu (3rd Ed, para 20-04 at p 208) the learned authors set out the several factors that a court must take into account in assessing compensatory damages. This is what they say:
>
> > The amount of damages awarded in respect of vindication and injury to reputation and feelings depends on a number of factors:
> >
> > (1) The gravity of the allegation.
> >
> > (2) The size and influence of the circulation.
> >
> > (3) The effect of the publication.
> >
> > (4) The extent and nature of the claimant's reputation.
> >
> > (5) The behaviour of the defendant.
> >
> > (6) The behaviour of the claimant.
>
> This list is most helpful. But it must be borne in mind that this is not by any means exhaustive of the matters which the court may take into account when making an assessment.

[96] In addition to the above analysis, much has been said about the defendant's behaviour, including her failure to obtain verification from the plaintiff and her failure to provide the plaintiff with an opportunity to provide her side of the story. The situation is further exacerbated by the fact that I had discovered earlier that the first impugned defamatory article published lacked any basis. Moreover, as previously mentioned, the plaintiff was accused of issuing a naked threat to David Morais. In spite of the fact that this was later found to be untrue, and that the defendant made a note of this in her article some two and a half years later, the defendant still has not apologised for this article. In fact, the defendant had never apologised on the entire article and had never acknowledged Dr R Kunaseegaran and the other accused's involvement in the murder of Dato' Anthony Kevin Morais.

[97] Returning to the quantification of the quantum involved and after having factored in the elements required to be considered in arriving at an identifiable quantum as reflected in the above cases and taking the same elements into account with respect to the reputational findings as earlier discussed, I believe that compensation for general and aggravated damages should only be RM1m, as opposed to the plaintiff's claim for RM100m. In analysing the quantum of this hypothetical award of RM1m, I believe that the amount reflects the appropriate level of compensation after comparing all the relevant cases. As an example, in *Jahara Hamid lwn Lim Guan Eng* [2015] MLJU 2358; [2015] 6 CLJ 328, the High Court awarded RM500,000 in general damages after the defamatory words asserted that the plaintiff therein had engaged in a racial agenda to stir hatred among races, was of poor character, and was a liar.

[98] Based on what has been discussed above, I believe the allegations made against the plaintiff before me are much more severe and deserve more attention to emphasise the fact that what the defendant has done is unacceptable.

[99] As an exercise of my discretion, therefore, I find that the amount of RM1m is appropriate in light of the seriousness of the libel and the extent to which the defendant had forced the plaintiff to suffer.

[100] In addition, I would have granted the plaintiffs request for a mandatory injunction to remove and delete the first impugned defamatory article.

[101] However, I would not have ordered the defendant to make a public and unqualified apology, especially when the first impugned defamatory article would have to be deleted in accordance with the injunction request.

[102] Aside from that, I would not have allowed a written undertaking to be

provided by the defendant to refrain from publishing any further defamation regarding or directed at the plaintiff in any way or manner in the future since it creates uncertainty and is too broad to be enforced.

[103] In regard to the issue of aggravated damages, I have included it along with the general damages (see *Evans on Defamation in Singapore and Malaysia* by Doris Cheah and Rueben Mathiavaranam (3rd Ed)).

[104] Further, I would not have allowed exemplary damages as I do not find any element of oppression, arbitrary, or unconstitutional, nor can I conclude that the defendant intended to make a profit as a result of the first impugned defamatory article (see *Rookes v Barnard* [1964] 1 All ER 367).

[105] The interest rate would have been 5%pa from the date of judgment to the date of full realisation.

[106] However, the above remains academic and non-enforceable at this point in light of my findings regarding the procedural issue described above.

CONCLUSION

[107] In light of the foregoing, the plaintiff's claim is dismissed with costs of RM15,000 subject to allocatur.

Plaintiff's claim dismissed with costs of RM15,000 subject to allocatur.

Reported by Dzulqarnain Ab Fatar